STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

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January 4, 1999

VIA UNITED PARCEL SERVICE

Magalie Roman Salas, Secretary
Federal Communications Commission
Office of the Secretary
Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: **Response by California to Petitions for Reconsideration, CC Docket No. 98-79**

Dear Ms. Salas:

Enclosed please find an original and six copies of **RESPONSE BY CALIFORNIA TO PETITIONS FOR RECONSIDERATION** in the above-referenced docket.

Also enclosed is one additional copy of this document. Kindly file-stamp this copy and return it to me in the enclosed self-addressed envelope.

Thank you for your attention to this matter. If you have any questions, I can be reached at (415) 703-2047.

Sincerely,

Ellen S. LeVine

Ellen S. LeVine
Attorney for the People of the
State of California and the Public
Utilities Commission of the
State of California

ESL:bwg

Encl.

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of GTE Telephone Operating Companies GTOC Tariff No. 1 GTOC Transmittal No. 1148	CC Docket No.98-79

RESPONSE BY CALIFORNIA TO PETITIONS FOR RECONSIDERATION

The People of the State of California and the California Public Utilities Commission ("California" or "CPUC") hereby file this response in support of the Petition for Reconsideration by MCI Worldcom ("MCI") and the Request for Clarification And/Or Reconsideration by the National Association of Regulatory Utility Commissioners ("NARUC") of the FCC's order in the above-referenced proceeding.

I. INTRODUCTION

On October 27, 1998, the CPUC issued Decision 98-10-057 in which it affirmed state jurisdiction over telephone traffic between end users and Internet Service Providers ("ISPs") in California. The CPUC further determined that such traffic is subject to the bill-and-keep or reciprocal compensation provisions of applicable interconnection agreements approved by the CPUC. The CPUC's decision is consistent with decisions of twenty-three other states which have concluded that the transmission by an end user to an

ISP is a local call which is separate and distinct from the ISP-provided computer services connecting the end user with Internet data bases.

Three days after the CPUC issued its decision, by order dated October 30, 1998 in the above-referenced proceeding, the Federal Communications Commission ("FCC") determined that GTE's ADSL special access service used by an end user to reach an ISP is part of a continuous transmission to the Internet data bases with which the end user interacts. In the Matter of GTE Telephone Operating Cos., Memorandum Opinion and Order, FCC 98-292 ("ADSL Order"). The FCC further concluded that since GTE's ADSL service was a special access service, the FCC's "ten percent" rule would apply.[1] Under this rule, the FCC asserted jurisdiction over these transmissions as interstate, based on its finding that in most cases the end user and the Internet data bases are located in different states.

The FCC made clear that its "decision...relates only to the jurisdictional treatment of the high speed access connection between an end user subscriber and an ISP" and made no determination on whether reciprocal compensation provisions applied. ADSL Order, ¶¶ 2, 29. The FCC declined to reach any other issues.

On November 30, MCI and NARUC each petitioned for reconsideration and/or clarification of the FCC's ADSL Order.

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[1] Under this rule, special access lines carrying more than *de minimis* amounts of interstate traffic (where *de minimis* is defined as more than ten percent), are subject to FCC jurisdiction. MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd 5660 (1989) ("MTS and WATS Market Structure Order").

II. THE CPUC GENERALLY SUPPORTS MCI'S PETITION

In its petition, MCI asserts that the FCC erred by not considering the ISP's Point of Presence ("POP") as the termination of a communication between an ISP and an end user. According to MCI, the FCC's conclusion that an end user's communication ends at a distant Internet website is contrary to FCC precedent and statements to Congress.

The CPUC agrees with MCI that the FCC should reconsider its decision. As discussed in the CPUC's decision of October 27, 1998, an ISP neither provides telecommunications services nor uses telecommunications in rendering its own services. "The ISP does not operate switches as does a telecommunications carrier, and does not switch calls to other end users. Rather, the ISP answers the call, signifying that the telecommunications service is terminated at the ISP modem" or POP. CPUC D.98-10-057, slip op. at 10. A call to an ISP is thus like calls to other recipients – both terminate when the ISP or recipient answers the call. Such a call is intrastate when the end user and ISP are located within the same state, and interstate when the end user and ISP are located in different states.

Once the ISP answers a call from an end user, the ISP accesses Internet data bases using its own computer network capabilities and technologies, "which are independent of the public switched telecommunications network." CPUC D.98-10-057, slip op. at 11. This finding by the CPUC is consistent with the FCC's order in In Re Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 5776 (1997), in which the FCC stated that Internet service "cannot accurately be characterized…as 'transmission, between or among points specified by the user.'" Id., ¶ 83. That is, the ISP does not provide its services via common carrier "transmission" or "telecommunications" pursuant to 47 U.S.C. § 153(20) of the Telecommunications Act of 1996. The ISP's services are separate and distinct from the transmission service used by an end user to reach an ISP. The FCC's ADSL Order to the contrary -- that the ISP computer services are provided "via telecommunications" and hence part of a continuous transmission from the end user -- is thus incorrect. ADSL Order, ¶ 20.

The CPUC also supports MCI's request for clarification that ADSL services are not inherently interstate services. As MCI correctly points out, ADSL is a transmission service that does not belong exclusively within one jurisdiction or the other. Depending upon the use to which ADSL is put, the service may be jurisdictionally interstate, intrastate, or both.

Lastly, the CPUC agrees with MCI that there is no record support for the FCC's "blanket conclusion that more than 10 percent of Internet traffic is destined for websites in other states or other countries." MCI Petition at 9. To be sure, in a petition for reconsideration of the FCC's MTS and WATS Market Structure Order, filed nearly ten years ago and still pending before the FCC, the CPUC challenged as irrational and arbitrary the FCC's ten percent rule for defining the jurisdictional nature of special access services. Among other things, the CPUC pointed out in its petition that "all telecommunications traffic, whether transmitted over the public switched network or private networks, contains essential information which allows a carrier (either local or interexchange) or private network manager to route each communication to its intended destination. Indeed, such information must be known in order that the communication is not sent to random and unintended locations." California Petition for Reconsideration at 5 and 7-8.[2] No party to that proceeding rebutted this fact. In addition, California discussed the illogic of the ten percent rule, pointing out that if a customer of special access service could determine that ten percent or less of its traffic was intrastate, then the customer logically had the means to ascertain whether some other percentage of its traffic was intrastate. California thus agrees with MCI that the record before the FCC lends no support to the FCC's conclusion that more than ten percent of the traffic destined for Internet websites is interstate.

III. THE CPUC GENERALLY SUPPORTS NARUC'S REQUEST

In support of its Request for Clarification and/or Reconsideration, NARUC identifies three grounds. First, NARUC requests that the FCC clarify that its order does not bar states from requiring carriers to file intrastate tariffs for ADSL service that connects end-users to ISPs. NARUC's request is consistent with the position of California and twenty-three other states that such connections are generally local, and hence subject to tariffing by the state.[3] California thus supports NARUC's request.

Second, NARUC requests that the FCC clarify that GTE must comply with the FCC's Part 36 separations rules for special access tariffs until the FCC revises them. As NARUC indicates, the Federal-State Joint Board on Separations is presently considering revisions to these rules. Under currently applicable rules, the cost of mixed use special

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[2] A copy of California's Petition for Reconsideration of the FCC's order in MTS and WATS Market Structure, 4 FCC Rcd 5660 (1989), is appended hereto.

[3] California, however, acknowledges that the ADSL service connection between an end-user and ISP could be jurisdictionally interstate.

access lines deemed interstate under the ten percent rule is directly assigned to the interstate jurisdiction. In accordance with these rules, 100 percent of the costs of GTE's ADSL special access lines should be assigned to the interstate jurisdiction, based on the FCC's belief that such lines are primarily interstate. NARUC, however, points out that GTE appears to be assigning 75 percent of the costs of these lines to the state jurisdiction, but crediting 100 percent of the revenue from these lines to the federal jurisdiction. If true, then GTE's jurisdictional assignment of costs is contrary to the FCC's rules, and results in a mismatch of costs and revenues that the FCC's rules are intended to avoid. California thus agrees with NARUC that the FCC should clarify that GTE is correctly applying the separation rules in order to ensure that state ratepayers are not saddled with all of the costs of, while interstate ratepayers reap all of the revenues from, GTE's special access lines.[4]

Finally, the CPUC supports NARUC's request that the FCC reconsider its order in light of the potentially broad policy ramifications that it raises. Specifically, as NARUC points out, the FCC should explain how it distinguishes an ISP from a telecommunications carrier, as defined in the Telecommunications Act of 1996, and thereby exempts an ISP from the common carrier obligations that attach to telecommunications carriers. In addition, the FCC should explain how the funding of

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[4] In its petition for reconsideration of the MTS and WATS Structure Order, the CPUC challenged the FCC's use of direct assignment for allocating the costs of dual-use special access lines in lieu of adopting fixed allocation factors that would more fairly apportion these costs. As discussed, the CPUC's petition is still pending at the FCC. Inasmuch as the Federal-State Joint Board is currently re-examining cost allocation procedures, including the direct assignment of costs, the CPUC will consider renewing its petition in that forum. In the meantime, the CPUC supports NARUC's request that the FCC make clear to GTE that it must directly assign 100 percent of the costs of its ADSL facilities to the federal jurisdiction in accordance with currently applicable cost allocation rules.

universal service for rural and high cost areas may be affected by the FCC's order. Absent consideration of these related issues, it is not clear how narrowly tailored the FCC's order is to the facts and circumstances of GTE's ADSL service. ADSL Order, ¶ 2.

IV. CONCLUSION

For the reasons stated, California supports the petitions of MCI and NARUC, and urges the FCC to reconsider and clarify its ADSL Order as discussed above.

Respectfully submitted,

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January 4, 1999

APPENDIX

Before the
Federal Communication Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
MTS and WATS Market Structure	)	CC Docket No. 78-72
	)	
	)	
Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board	)	CC Docket No. 80-286
	)	
	)	
	)	

PETITION FOR RECONSIDERATION

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August 24, 1989

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SUMMARY

The FCC should reconsider its decision to adopt direct assignment in lieu of allocation for separating the costs of dual use special access facilities. The use of an allocation approach is feasible, reasonable and consistent with federal policy. An allocation approach is also consistent with the dual regulatory scheme for jointly-used facilities embodied in the Communications Act.

The FCC's rejection of an allocation approach for separations purposes is without factual basis and contrary to applicable law. Despite contrary assertions in the Joint Board Order, an allocation approach, whether usage-based or fixed, presents no undue administrative burden or economic efficiency concerns. Moreover, an allocation approach satisfies the twin goals highlighted in the Joint Board Order of preventing tariff shopping and fairly recognizing both federal and state interests in jointly-used special access facilities.

In contrast, the FCC's adoption of direct assignment of the costs of jointly-used facilities based on a test of de minimis use is impermissibly arbitrary. And fundamentally, the adopted approach does little to overcome difficulties inherent in the previous approach--namely, prevention of tariff shopping and inadequate recognition of the states' interest in jointly-used facilities.

Accordingly, California respectfully requests that the FCC reconsider its decision by adopting an allocation approach, whether usage-based or fixed, for the separation of costs of dual use special access facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
MTS and WATS Market Structure	)	CC Docket No. 78-72
	)	
Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board	)	CC Docket No. 80-286

PETITION FOR RECONSIDERATION

Pursuant to Section 405 of the Communications Act of 1934, 47 U.S.C. §151 et seq. and Section 1.429 of the Rules of Practice and Procedure of the Federal Communications Commission ("FCC"), 47 C.F.R. §1.429, the People of the State of California and the Public Utilities Commission of the State of California ("California") respectfully petition for reconsideration of the Decision and Order, released July 29, 1989 in the above-referenced proceeding.

BACKGROUND

In its Decision and Order, the FCC adopted the separations procedures for dual use special access lines recommended by the Joint Board in its Recommended Decision and Order, released February 7, 1989, in this same docket. ("Joint Board Order" or "Order"). The FCC indicated that it also adopted in full the Joint Board's reasoning underlying its recommendation.

Under the separations procedures adopted, the costs of dual use special access facilities would be assigned totally to the intrastate jurisdiction when such lines carry a de minimis amount of interstate traffic. The FCC defines de minimis amount to mean 10 percent or less interstate traffic. The cost of dual use special access facilities carrying a larger portion of interstate traffic would be assigned entirely to the interstate jurisdiction.

Prior to this time, the existing separations rules did not specifically address the treatment of private lines or WATS lines that carry both interstate and interstate traffic. Joint Board Order at ¶2 & n.13. As a result, in some cases, the costs of dual use facilities were generally assigned entirely to the interstate jurisdiction if any portion of traffic on those lines, however small, was interstate. In other cases, the local exchange carriers ("LECs") assigned the full cost of dual use facilities based on the tariff from which the customer chose to obtain service. Joint Board Order at ¶4. Because parties questioned these practices, known as direct assignment, in connection with dual jurisdictional WATS service, the FCC asked the Joint Board to examine the separations treatment for WATS and all other dual use special access facilities.

The approach recommended by the Joint Board and adopted by the FCC is a minor modification of the direct assignment practices previously followed. The Joint Board and the FCC rejected the adoption of any type of allocation method which would divide the costs of jointly-used special access facilities between the federal and state jurisdictions. For the reasons discussed below, the FCC's rejection of separations procedures based on allocation, and the adoption of such procedures based on direct assignment, are arbitrary and contrary to law.

I. Cost Allocation Is Feasible and Reasonable for All Dual Use Special Access Facilities

The Joint Board Order considered and rejected separations procedures based on allocating the costs of dual use special access facilities between the intrastate and interstate jurisdictions. Yet contrary to the Order's rationale, separations procedures based either on fixed cost or usage-based allocators are clearly feasible without causing undue administrative burden or undermining legitimate economic efficiency concerns. Allocation procedures are also consistent with the twin goals of minimizing tariff shopping and properly recognizing state and federal interests over jointly-used facilities. The FCC should therefore reconsider the conclusions reached in the Joint Board Order.

A. The Use of Fixed Allocators Is Feasible and Reasonable

The use of a fixed allocator for separating the costs of dual use special access lines is fully consistent with the FCC's use of a fixed allocator for separating the costs of dedicated subscriber lines, where the costs of such dedicated (or private) facilities do not vary with usage. Accordingly, as was done for subscriber lines, the FCC could develop a fixed allocator for special access lines based on estimates of gross relative use.

Alternatively, a simpler, and equally reasonable method would be to split evenly between the jurisdictions the costs of special access facilities to reflect their fixed cost nature. An even allocation to each jurisdiction would reflect the reality that the available capacity to carry interstate traffic over each line is precisely equal to the capacity to carry intrastate traffic.[1]

Whatever the specific gross allocation factors, there can be no real dispute that the adoption of fixed allocators would be administratively simple. The acquisition of data concerning usage would be no more onerous than acquiring similar data for dedicated subscriber lines. Just as with dedicated subscriber lines, data could be obtained by occasional sampling or auditing. It would not be necessary to obtain such information for each access line.

Notwithstanding the above considerations, the Joint Board Order rejects with little analysis the use of fixed allocators for special access lines. Instead, the Order lumps its rejection of fixed allocators with its rejection of usage-based allocators. Yet most of the reasons for rejecting usage-based allocators have little or no application to fixed allocators, or have been found uncompelling by the FCC in other contexts, such as switched access and ONA services.[2] The FCC should therefore reconsider

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1. Adoption of a fixed allocator for fixed costs is also consistent with the FCC's cost-causation policies and non-usage based pricing principles for access charges.

2. See Section II. infra.

the adoption of fixed allocation factors as a viable option for separating the costs of dual use special access facilities.

B. Cost Allocation Based on Measurement of Usage Is Feasible and Reasonable

All telecommunications traffic, whether transmitted over the public switched network or private networks, contains essential information which allows a carrier (either local or interexchange) or private network manager to route each communication to its intended destination. Indeed, such information must be known in order that the communication is not sent to random and unintended locations.[3]

In light of this fact, the jurisdictional nature of telecommunications traffic can always be determined. Such jurisdictional information allows the costs of the network facilities underlying communications to be allocated between the interstate and intrastate jurisdictions.

Currently, local exchange carriers have the capability of directly measuring whether traffic over WATS lines is interstate or intrastate. And, to the extent that traffic over 800 lines contains calling number identification, there is no reason why such traffic cannot also be measured.

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3. Specifically, interexchange carriers like AT&T, MCI, and US Sprint, which purchase special access services to connect to their points of presence, thereafter switch calls to their intended destinations. Such switching allows the interexchange carrier to ascertain and measure interstate and intrastate traffic, and bill pursuant to published tariffs.

Likewise, there is no reason why local exchange carriers could not measure traffic over many private switched networks by using jurisdictional information contained in standard protocols for MTS-like and WATS-like voice networks, packet switched networks, and ISDN-compatible networks. Such protocols include provisions for information which indicates the origin and destination of traffic, and hence, the jurisdictional nature thereof, over such networks.

Similarly, to the extent that interexchange carriers purchase special access lines to connect customers to interexchange points of presence for switched service, the local exchange carrier should have the capability of determining the routing of such calls because of the use of standard protocols.

Local exchange carriers are also familiar with conducting, on a routine basis, traffic studies in order to measure the jurisdictional nature of traffic over public switched access facilities for separations purposes. Such measurement is performed through equipment which is readily available and can be placed on special access lines if traffic sampling or other measurement techniques are adopted.

Despite the above, the FCC does not explain why measurement of traffic over dual use special access lines is not possible or feasible. As discussed above, in many cases, it is.

California, however, acknowledges that there will be private switched networks where information on the origin and destination of traffic is inaccessible to the LECs because of the use of non-standard communications protocols. Nevertheless, in such cases, alternative approaches could be taken. For example, standard protocols could be prescribed to allow measurement. Alternatively, network managers of private networks could be required to report how much of the traffic over special access lines leased from the carriers is interstate or intrastate.

To be sure, the development of appropriate software to permit jurisdictional reporting of traffic on special access lines not now feasibly measurable will entail some start-up costs. However, there is no reason to expect that such costs will differ greatly from those currently spent to provide ordinary network management capabilities, such as automatic call routing algorithms and traffic analysis reports. In cases in which these costs would be borne by the local exchange carrier or other carriers, they should be minimal in light of total company operation costs. Indeed, similar types of costs necessary to measure the jurisdictional nature of public switched access for message toll service have been deemed reasonable and routine.

In those cases where the private network manager, not the local exchange carrier, has the capability of ascertaining and measuring interstate and intrastate traffic over a private system, there is no reason to expect that the network manager could not do so. Presumably, information concerning usage of the network, the type of facilities needed for such usage, and their configuration, is compiled by a network manager. Additionally, the network manager generally must know where traffic is routed, not only to prevent routing to unintended locations, but also for internal accounting purposes. Accordingly, the software necessary to perform these business functions logically is already built into most networks.[4] Performance of traffic measurement for jurisdictional reporting purposes therefore would not appear to be unfamiliar to a network manager, or entail costs that differ markedly from costs already incurred.

Notwithstanding the above, California recognizes that there may be limited cases where one could demonstrate that the cost of measuring comprehensively the jurisdictional nature of traffic over special access lines is not justified. However, no such showing has been made here. Moreover, even if it could, there is no reason why the use of sampling techniques or surrogates would not be a viable alternative in order to permit cost allocation between the jurisdictions. Indeed, the FCC has adopted surrogates for allocating the costs for Feature Group A and Feature Group B switched access services between the jurisdictions. The LECs also routinely use sampling techniques for discerning the jurisdictional nature of terminating access.

In sum, the FCC has not demonstrated that the jurisdictional character of traffic over special access lines cannot be measured in most circumstances. In those circumstances where comprehensive measurement is not justified, the FCC has also failed to show why surrogates or sampling alternatives are not viable for determining whether traffic is interstate or intrastate.

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4. As a matter of prudent business practice, one would expect a newtwork manager to know the origin and destination of traffic over the private network in order to minimize costs.

II. The Reasons for Rejecting Allocation Factors for Separations Purposes Are Legally Uncompelling

In rejecting the adoption of cost allocation factors, either fixed or usage-based, for jurisdictional separations purposes, the Joint Board Order identifies primarily administrative burdens which the FCC believes such factors present. The Joint Board Order also indicates that allocation factors may be economically inefficient. Neither rationale has merit.

First, the Joint Board Order cites comments that costly and burdensome traffic studies would have to be performed to measure the jurisdictional character of traffic over special access facilities.[5] However, as discussed above, there is no evidence of exceptional difficulty in measuring traffic over private networks where standard communications protocols are used. Inasmuch as the local exchange carriers are already performing such traffic studies for public switched access, there is no apparent reason why similar studies could not be performed over most private networks.[6] And contrary to the statement in the Joint Board Order, costly measurement equipment would not be necessary, since such equipment is presumably already being used for measuring traffic over public switched access facilities.

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5. Notably, neither the Joint Board Order nor the Decision and Order cites any supportive cost figures.

6. In any event, the Joint Board Order acknowledges that use of a fixed allocation factor would not require frequent traffic studies. Joint Board Order at ¶25 and n.122.

Second, the Order cites comments that customers cannot measure traffic over private networks. Yet again, as discussed above, a network manager presumably already possesses the capability of determining where calls are destined to ensure proper routing and proper accounting. Likewise, there is no basis to expect the costs of jurisdictional measurement to differ markedly from costs already incurred for performance of other system operational functions.

The claim that customers cannot measure traffic over their private networks is further contradicted by the Joint Board Order itself. Under the method adopted, customers will be required to determine whether 10 percent or less of the traffic over their networks is interstate. The Order in fact states that customers will know their system design and communications needs, and therefore should be able to make this measurement. Joint Board Order at n.137. In light of these facts, there is no reason given why customers could not equally ascertain whether 20, 30, 40 percent or some other estimate of the traffic over their networks is interstate.[7]

Third, the Order states that customers will be confused if separations procedures are based on allocation because they will have to purchase services out of two tariffs, one for interstate and another for intrastate use. The customers likely to purchase special access services, however, are quite sophisticated

7. California is not suggesting that exact precision is required. California simply is saying that some degree of measurement is feasible.

business customers. In many cases, these customers will be interexchange carriers which are readily familiar with purchasing services, such as public switched access, out of two tariffs. Other business customers are similarly accustomed to purchasing services out of two tariffs. [8]

The concern with customer confusion, moreover, is somewhat curious in light of the FCC's decision to introduce dual tariffing of ONA services which historically have been tariffed only as intrastate services. In the ONA context, customers for the first time will be required to purchase a wide variety of services, known as basic service elements, from interstate and intrastate tariffs. However, in making its decision, the FCC apparently did not believe that customer confusion was a major factor outweighing its desire to introduce dual tariffing.

Fourth, in a similar vein, the Joint Board Order cites claims that carriers will have to introduce costly billing procedures because of dual tariffing of special access services. There is no reason, however, to expect that billing procedures would be any more onerous than those currently in place for billing public switched access services. Likewise, inasmuch as the introduction of new procedures to permit billing for interstate and intrastate ONA services has never been considered

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8. Likewise, the concern that dual tariffing will raise additional billing disputes is no greater than such concern inherent in any type of dual tariffing, such as for public switched access services or ONA services.

unduly burdensome, there is no basis to conclude that billing of special access services would be.

Lastly, the Joint Board Order cites concerns that separations procedures based on allocation will undermine flat rate pricing of special access services, which the FCC has determined is economically efficient. The Order also indicates that such separations procedures will result in discrimination between AT&T's WATS service and competitors' services. While California can appreciate the FCC's desire to determine how the states price special access services based on those costs allocated to the intrastate jurisdiction, the FCC simply has no authority to make such determinations.[9] Separations procedures based on allocation therefore should not (and indeed, cannot) be rejected on the basis that the FCC is not willing to recognize state oversight of pricing for intrastate services.[10]

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9. The FCC specifically is concerned that states might adopt usage-based pricing for special access services, and that such pricing will discourage consolidation of traffic onto one set of access lines. California, however, has never priced special access services based on usage, and does not intend to do so. In addition, California is unaware of any intrastate public switched access services priced on a usage-sensitive basis. There is thus no reason to expect states to adopt usage-sensitive pricing for intrastate special access services.

The further concern that federal and state special access tariffs may contain different rate elements is not unique to such tariffs. Differing rate elements currently exist in federal and state public switched access tariffs.

10. In fact, none of the discussed separations approaches, whether allocation or direct assignment, satisfies the criteria for economic efficiency. Nonetheless, an allocation approach in no way precludes the interstate or intrastate jurisdiction from adopting pricing methodologies consistent with economic efficiency criteria if deemed appropriate.

III. The Adopted Direct Assignment Approach Is Arbitrary and Contrary to Law

A. Direct Assignment of Costs Only to One Jurisdiction Does Not Properly Balance State and Federal Interests

The rationale supporting the adoption of the direct assignment approach essentially is based on considerations of simplicity and preservation of federal pricing schemes. Simplicity, while laudable, cannot justify displacement of the states' legitimate interest in regulating services provided on an intrastate basis. To the extent that the costs of dual use facilities supporting special access services can be divided, they must be. This is so even if such division adds administrative costs. Indeed, if the Joint Board Order is carried to its logical conclusion, no services should be subject to dual regulation because in nearly every single case, the administrative costs thereof will likely exceed the administrative costs of regulation by a single jurisdiction.

Moreover, as discussed above, the concern with preserving federal flat rate pricing schemes cannot be used as a basis for adopting separations procedures which arbitrarily deprive the states of any jurisdiction to adopt differing schemes when interstate usage exceeds 10 percent. [11] Thus, in those cases

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11. The Joint Board Order states that the typical case is one in which the interstate portion of traffic over special access lines is 10 percent or less, such that the assignment of the costs of these lines would be solely to the state jurisdiction. However, there is nothing in the record that supports the assertion that such cases are typical.

where interstate usage is 10.1 percent, and intrastate usage 89.9 percent, the states will be denied any authority to regulate such usage.

Even if the rationale supporting direct assignment over allocation for separations purposes were valid, the adopted approach is arbitrary. There is simply nothing in the record to support the adoption of a factor of 10 percent or less to determine when costs should be entirely assigned either to the interstate or intrastate jurisdiction. Equally valid would be a factor of 50 percent or less. Indeed, this type of factor would at least better balance state and federal interests in jointly-used special access facilities, a major consideration underlying the Joint Board Order. Id. at ¶1.

Moreover, the adopted approach fails to prevent tariff shopping, a fundamental concern of the Joint Board Order. Indeed, this approach encourages it. A customer examining federal and state tariffs for special access services will have a strong incentive to configure its network to take advantage of the cheaper tariff. Further, in light of the fact that the local exchange carriers will not be able to require usage information, there is no way to verify whether or not usage is de minimis. As a practical matter, the approach adopted fails to mitigate the very problem inherent in the pre-existing approach.

B. The Adopted Direct Assignment Approach Is Contrary to Law

Inasmuch as the traffic over dual use special access lines can be measured, the costs of such lines must be apportioned in a reasonable manner between the jurisdictions. Direct assignment of the costs of jointly used facilities in these circumstances is inconsistent with the dual regulatory scheme underlying the Communications Act.

More than fifty years ago, in Smith v. Illinois Bell Tel. Co., 282 U.S. 139 (1930), the Supreme Court made clear that "separation of intrastate and interstate property, revenues and expenses of the [telephone] company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of recognition." Id. at 148 (emphasis added). Thus, "when the same plant and equipment is used to provide both interstate and intrastate services and different authorities set rates for these respective services, costs and investment must be apportioned uniformly in order to establish fair rates." Hawaiian Tel. Co. v. PUC, 827 F.2d 1264, 1275 (9th Cir. 1987), cert. denied, 108 S.Ct. 2870 (1988).

The facts in Smith are similar to those identified in the Joint Board Order. In Smith, the state commission had approved for separations purposes a method developed by Illinois Bell Telephone Company which assigned no costs of jointly-used facilities to interstate toll service. Instead, the costs of such facilities were directly assigned to the states. The Supreme Court, however, rejected the company's argument that it was practically difficult to divide the costs of these facilities between interstate and intrastate service. 282 U.S. at 150. The court instead pointed to the "indisputable fact that the subscriber's station, and the other facilities of the Illinois

Company" are used for both local exchange and interstate telephone service. Id. The court then concluded that

> "[w]hile the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential, it is quite another matter to ignore altogether the actual uses to which the property is put." Id. at 150-51.

See also NARUC v. FCC, 737 F.2d 1095, 1112 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

Here, too, it is indisputable that special access lines are used in connection with both interstate and local telephone service. Inasmuch as the jurisdictional nature of the traffic on these lines can be determined by reasonable means, there is no lawful basis for adopting separation procedures which "ignore altogether the actual uses to which the property is put." Smith at 150-51. As discussed above, reasonable measures exist to allocate the costs of jointly-used special access facilities between the state and federal jurisdictions. [12] By allocating these costs, the states' legitimate role in regulating intrastate services provided over such facilities is preserved in a manner consistent with congressional intent.

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12. California does not suggest that Smith mandates the adoption of a particular allocation method, but only that an allocation, based on a reasonable method, be made.

CONCLUSION

Based on the above, California respectfully requests that the FCC reconsider its Decision and Order. As discussed, allocation of the costs of dual use special access lines for separations purposes is feasible, reasonable, and consistent with the policy underlying the Communications Act.

Respectfully submitted,

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August 24, 1989

Before the
Federal Communication Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
MTS and WATS Market Structure	)	CC Docket No. 78-72
	)	
Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board	)	CC Docket No. 80-286
	)	

ERRATA TO PETITION FOR RECONSIDERATION

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August 29, 1989

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board	)	CC Docket No. 78-72 CC Docket No. 80-286

ERRATA TO PETITION FOR RECONSIDERATION

The People of the State of California and the Public Utilities Commission of the State of California ("California") has recently learned of an error contained in their Petition for Reconsideration, dated August 9, 1989 in the above-referenced proceeding. At page 12, footnote 9 of of California's petition, the following sentences should be corrected to read:

> "In addition, California is unaware of any intrastate public special access services priced on a usage-sensitive basis. There is thus no reason to expect states to adopt usage-sensitive pricing for such services."

The other portions of footnote 9 remain unchanged.

California respectfully requests that this errata sheet be filed with California's Petition for Reconsideration.

Respectfully submitted,

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August 29, 1989

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon all known parties of record by mailing, by first-class mail, postage prepaid, a copy thereof properly addressed to each party.

Dated at San Francisco, California, this 4th day of January, 1999.

Berlina Gee

Berlina Gee